

Cao (Migration) [2023] AATA 1632 (10 May 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Yongxin Cao

REPRESENTATIVE: Ms Tian Li (MARN: 0958634)

CASE NUMBER: 2206221

HOME AFFAIRS REFERENCE(S): BCC2021/1155745

MEMBER: Damian Creedon

DATE: 10 May 2023

PLACE OF DECISION: Perth

DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 10 May 2023 at 6:57pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – education transcript – notarial certificate – compelling or compassionate reasons – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 65, 360
Migration Regulations 1994, r 1.03; Schedule 2 cl 500.217; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 7 April 2022 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (**the Act**).

2. Background

3. The applicant applied for the visa on 28 May 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate found that the applicant had provided, or caused to be provided, a bogus document or false or misleading information to the Department and therefore did not satisfy the PIC 4020 criterion.

4. First hearing

5. On 12 April 2023 the Tribunal wrote to the applicant inviting her to appear before the Tribunal on 27 April 2023 to give evidence and present arguments. The invitation was sent to the applicant's registered migration agent.

6. On the morning of 27 April 2023, the applicant wrote the Tribunal in the following terms:

7. *This is Yongxin Cao. I am sorry to bother you at this time. I have had [a medical condition] for a few times from midnight yesterday to this morning. I am lack of strength and not feeling well today. So I am wondering whether you could kindly postpone the hearing for me?*

8. The applicant also filed with the Tribunal with an electronic scan of a 'Medical Certificate' in which the applicant's doctor certifies that the applicant is unfit to attend her workplace for the period 27 April 2023 to 29 April 2023.

9. Accordingly, the Tribunal acceded to the applicant's request to postpone the hearing on 27 April 2023.

10. Second hearing

11. On 1 May 2023 the Tribunal wrote to the applicant inviting her to appear before the Tribunal on 8 June 2023 to give evidence and present arguments. The invitation was sent to the applicant's registered migration agent.

12. In her signed response to the invitation, dated 8 May 2023, the applicant indicated that she:

13. *...will not participate in the hearing, and consent[s] to the Tribunal making a decision on the papers without taking further steps to allow [her] to appear.*

14. The Tribunal is satisfied that the necessary consent has been given under s.360(2)(b) of the Act and that, pursuant to s.360(3), the applicant is no longer entitled to appear before it. This matter has therefore been determined on the evidence available to the Tribunal.

15. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217(1) for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
17. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

18. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
19. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
20. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

Overview of evidence

21. The applicant is a 23-year-old Chinese national.¹
22. The Tribunal had before it a copy of both the delegate's decision, which the applicant provided to the Tribunal, and the Department's file in relation to the application.
23. The delegate's decision record notes the following information:

Based on the evidence and information before me, I find that the applicant has caused to be given a bogus document within the meaning of section 5(1) of the Migration Act. Therefore, I am not satisfied that the applicant meets Public Interest Criterion (PIC) 4020, subclause 4020(1).

On 28 May 2021, the applicant lodged a Student (TU 500) visa application whilst in Australia as the holder of a Student (TU 500) visa. I note that the applicant was granted their previous Student (TU 500) visa on 19 March 2018; which ceased to be in effect on 4 July 2021.

As the applicant held their previous Student visa in the period of 12 months before this Student visa application was made, I have taken into consideration the information provided to the Department in relation to applicant's previous Student (TU 500) visa, as per Public Interest Criteria (PIC) 4020(1) (b).

With their previous student visa application that was granted on 19 March 2018, the applicant provided a documented titled 'Transcript and Study Certificate' issued by Quanzhou No. 9 Middle School, and accompanied by a Notarial Certificate from Quanzhou City Notary Public Office.

In August 2021, a Departmental officer contacted the Quanzhou City Notary Public Office. The responding officer confirmed that Quanzhou City Notary Public Office was renamed as Quanzhou City Tonghuai Notary Public Office in 2011. The officer at Quanzhou City Tonghuai Notary Public Office also confirmed that:

the notary public, ZHANG Yuanfeng, left the notary public office before 2018

that notarial certificates with the name: Quanzhou City Notary Public Office are fraudulent.

On 16 September 2021, the applicant was provided with 28 days to provide comment on the adverse information supplied to the Department.

To date a response has not been received by [sic: from] the applicant.

24. The Tribunal has reviewed the Department's file and has read and had regard to the delegate's letter to the applicant dated 16 September 2021 inviting her to provide comments in relation to the adverse information set out above, and to

25. ...specify if you believe there are any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of any or all of PIC 4020(1) to justify the grant of the visa.

26. No response to the invitation is evident on the Department's file.

¹See: applicant's passport [number].

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

27. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
28. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
29. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
30. The Tribunal notes the information set out in the delegate's decision record that, in connection with her visa application, or with a visa held in the 12 months before the visa application was made:
 - a. the applicant provided a document entitled 'Transcript and Study Certificate' issued by Quanzhou No. 9 Middle School, and accompanied by a Notarial Certificate from Quanzhou City Notary Public Office;
 - b. departmental inquiries confirmed that 'Quanzhou City Notary Public Office' was renamed 'Quanzhou City Tonghuai Notary Public Office' in 2011; and
 - c. an officer at 'Quanzhou City Tonghuai Notary Public Office' provided information that notarial certificates with the name 'Quanzhou City Notary Public Office' are fraudulent.
31. Based upon this information, and in the absence of any evidence to the contrary, the Tribunal finds that the applicant has given, or caused to be given, to the Minister, an officer, or a relevant assessing authority of the Commonwealth a 'bogus document', as defined in s 5(1) of the Act in relation to the visa application or a visa held in the 12 months before the visa application was made.
32. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

33. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

34. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
35. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
36. Despite having been invited to do so, the applicant has advanced no evidence and provided no arguments claiming that there are:
- a. compelling circumstances that affect the interests of Australia, or
 - b. compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen,
37. that justify the granting of the visa.
38. Having reviewed all of the material before it, including the departmental file, the Tribunal has found no evidence to justify the waiver of the requirements of PIC 4020(1).
39. Therefore, the requirements of PIC 4020(1) should not be waived.
40. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).

DECISION

41. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Damian Creedon
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...